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Supreme Court of the United States

OCTOBER TERM, 1949.

STATE OF OHIO, EX REL. CALVIN BEVIS,
Petitioner,

vs.

GEORGE L. COFFINBERRY, RICHARD W. MORSE AND WILL T. BLAKE, AS MEMBERS OF THE INDUSTRIAL COMMISSION OF OHIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Calvin Bevis for this court's writ of certiorari to review a judgment and opinion of the Supreme Court of Ohio rendered in this cause on April 20, 1949.

JURISDICTION.

The jurisdiction of this court to review the question herein presented is invoked under Section 237 (b) of the Judicial Code of the United States as amended (28 U. S. C., 344). The judgment of the Supreme Court of Ohio which was entered on April 20, 1949, became final on May 4, 1949 upon the denial of the application for rehearing. The right of the petitioner to due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution was especially set up and claimed at every stage of the proceedings below.

STATEMENT OF FACTS.

The Supreme Court of Ohio sustained a general demurrer to a petition in mandamus filed by petitioner in that court against the respondents. The court based its decision on the ground that the payment of compensation to employees who have incurred occupational diseases is limited in Ohio to certain enumerated types of diseases. State, ex rel. Bevis, v. Coffinberry, 151 O. S., 297. The legislature of Ohio made all occupational diseases compensable effective October 12, 1945 by enacting Section 23 of the Ohio General Code 1465-68a. The petitioner claimed his rights under such amendment before the Industrial Commission, and alleged the same in his petition, argued it in his brief, and orally before the Supreme Court of Ohio. Petitioner says he was denied due process of law by both the Industrial Commission and the Supreme Court of Ohio by their refusal to apply the amendment.

All of the evidence introduced by the parties before the Industrial Commission stated that the petitioner was

permanently and totally disabled. No evidence to the contrary was introduced. The Industrial Commission and its subordinate boards substituted opinion for evidence and found the petitioner was "not totally disabled due to his silicosis." This violated the petitioner's right to a fair hearing as guaranteed to him by the Fourteenth Amendment of the United States Constitution, and constituted a gross abuse of discretion, and all of which was alleged in the petition in the lower court.

QUESTIONS PRESENTED.

(1) Does the Fourteenth Amendment of the United States Constitution require that the Industrial Commission and the Supreme Court of Ohio apply the Workmen's Compensation Act as amended by the legislature and which became effective prior to the time petitioner's claim was filed with the Industrial Commission?

(2) Does it constitute a gross abuse of discretion for the Industrial Commission and its subordinate boards to exceed their jurisdiction by arbitrarily refusing to weigh evidence, to classify occupational disease according to the usual and accepted medical classification, and to substitute opinion for evidence in violation of petitioner's right to a fair hearing as guaranteed to him by the Fourteenth Amendment of the United States Constitution?

SPECIFICATION OF ERRORS TO BE URGED.

(1) The Supreme Court of Ohio erred in denying due process of law to the petitioner by not applying the Amended Workmen's Compensation Law in considering the sufficiency of petitioner's allegations in his pleading in the mandamus action.

(2) The Supreme Court of Ohio erred in not performing its judicial duty of holding the Industrial Commission to the standards of fair play necessary to protect the constitutional right of petitioner to due process of law, and which standards were outlined by the United States Supreme Court in St. Joseph Stockyards Co. v. U. S., 298 U. S., 38, and Morgan v. U. S., 298 U. S., 468, 304 U. S., 1—and which cases were cited in petitioner's application for rehearing in the Ohio Supreme Court.

Wherefore, petitioner prays that this petition for a writ of certiorari issue to the Supreme Court of Ohio for the purpose of reviewing the question hereinbefore specified.

ROBERT EMMETT BROOKS,
LOUIS C. CAPELLE,
ROBERT E. L. YOUNG,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the court below was officially reported in 151 Ohio State, 293.

The jurisdiction of this court to review the questions herein presented is invoked under Section 237 (b) of the Judicial Code of the United States as amended (28 U. S. C., 344). The right of the petitioner to due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution was especially set up and claimed at every stage of the proceedings below.

The Supreme Court of Ohio sustained a general demurrer to petitioner's petition in mandamus against the respondents in that court. The Supreme Court of Ohio as well as the Industrial Commission failed to apply the amendment to the Workmen's Compensation Law which made all occupational diseases compensable in Ohio, and which went into effect prior to the time petitioner's claim was filed with the Industrial Commission of Ohio. The petitioner had alleged that the Industrial Commission and its subordinate boards had failed to meet the standards required by due process of law and had departed from fair play by substituting opinion for evidence, by arbitrarily refusing to consider material evidence and to properly classify petitioner's occupational disease, and by reaching a conclusion not supported by the evidence but based solely on conjecture. The Supreme Court of Ohio erroneously held this did not constitute a gross abuse of discretion. The petitioner had no other legal remedy than mandamus.

FIRST SPECIFICATION OF ERROR.

The Supreme Court of Ohio erred in denying due process of law to the petitioner by failing to apply the Amended Workmen's Compensation Act in considering the sufficiency of petitioner's pleading in the mandamus action.

The Supreme Court of Ohio said in its opinion, 151 Ohio State, p. 296:

> "The payment of compensation to employees who have incurred occupational diseases is limited in this state to certain enumerated types of disease."

The Ohio General Code Section 1465-68a after listing a schedule of 22 compensable occupational diseases was amended effective October 12, 1945 by addition of the following provision:

> "Sec. 23. All Other Occupational Diseases. (A disease peculiar to a particular industrial process, trade or occupation and to which an employe is not ordinarily subjected or exposed outside of or away from his employment.) All conditions, restrictions, limitations, and other provisions of this section, with reference to the payment of compensation or benefits on account of silicosis, shall be applicable to the payment of compensation or benefits on account of any other occupational disease of the respiratory tract resulting from injurious exposure to dusts."

The legislature of Ohio has made all occupational diseases compensable under certain conditions. Lamneck's

Ohio Workmen's Compensation Practice Manual, page 83.

The fundamental principle recognized by all civilized governments is, that no person shall be deprived of his substantive rights except as the matters are determined by the law of the land. Murray v. Hoboken Land Co., 18 How. (U. S.), 272. A valid legislative enactment should be given effect by the Industrial Commission and the Supreme Court of Ohio; and not treat such an amendment as a nullity where petitioner has claimed rights thereunder.

The petition in mandamus contained the allegation: "Relator says that **Section 23** as well as Section 22 of General Code 1465-68, were in effect at the time the employer filed original notice OD 1-22 with the respondents." Petitioner was denied due process when the above section was held to be meaningless.

SECOND SPECIFICATION OF ERROR.

The Supreme Court of Ohio erred in not performing its judicial duty of holding the Industrial Commission to the standards of fair play necessary to protect the constitutional right of petitioner to due process of law, and which standards were outlined in St. Joseph Stockyards Co. v. U. S., 298 U. S., 38, and Morgan v. U. S., 298 U. S., 468, 304 U. S., 1, cited in petitioner's application for rehearing in the court below.

Exhibit A attached to petitioner's pleading in the lower court was made a part thereof. It shows the waiver of a physical examination by the Industrial Commission by the self-insuring employer, who submitted the report of its own examiner in lieu thereof. This evidence agreed with that of plaintiff as to the extent of petitioner's disability, namely, that the petitioner was **permanently** and was the extent of the disability. There was no evidence **totally** disabled. All evidence introduced agreed that introduced to the contrary. The Industrial Commission and its subordinate boards substituted opinion for such evidence and made a finding that the petitioner was not totally disabled. This finding was based solely on conjecture and had no foundation in the evidence. Nothing can be considered evidence which is not introduced as such, and the Supreme Court of the United States so held in the cases cited in petitioner's application for rehearing.

If the determination of fact is based on no evidence at all, or upon evidence so unsubstantial that it is deemed equivalent to no evidence, judicial review may be had, for due process requires that the determination be based

upon substantial and legally competent evidence, and whether there is such evidence is a question of law.

Walker v. San Gabriel, 20 Cal., 2d, 879, 129 Pac., 2d, 349;
Bridges v. Wixon, 326 U. S., 179, 65 S. Ct., 1443.

If there is no reasonable ground to justify a decision by an officer or board other than one way, and there was a failure to so act, the mandamus is broad enough to compel the making of such a decision.

State, ex rel. Coffey, v. Chittenden, 112 Wis., 569, 88 N. W., 587.

Procedural due process guarantees a judicial consideration of constitutional facts.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S., 287, 40 S. Ct., 527;
St. Joseph Stockyards Co. v. U. S., 298 U. S., 38.

He who decides must hear. The agreed evidence as introduced was that the petitioner was permanently and totally disabled. This evidence should have been considered controlling, and not disregarded because the Industrial Commission's opinion happened to be different.

Morgan v. U. S., 298 U. S., 468, 304 U. S., 1;
Deter v. Ind. Acc. Comm., 45 Cal. A., 2d, 664.

The opinion of the Ohio Supreme Court would render the reports of examining physicians introduced in evidence valueless, and permit the Industrial Commission to arbitrarily and unreasonably substitute its own opinion for the same although they did not examine the claimant.

Any substantial departure from fair methods of procedure may be considered as an excess of jurisdiction.

Morgan v. U. S., 298 U. S., 468, 304 U. S.,1;
Boswell Co. v. Ind. Acc. Comm., 67 Cal. A., 2d, 347.

The petitioner alleged in his pleading that the silicosis referees did not consider the clinical findings of the attending physician; and that the respondents arbitrarily refused to make the silicosis referees classify the silicosis. The lower court in its opinion herein, 151 O. S., p. 297 states:

> "Failure to so classify the silicotic condition indicates that there may not have been sufficient consideration of the facts presented to the referees."

Petitioner claims that this departure from fair methods of procedure was in excess of the jurisdiction of the Industrial Commission, and violated his constitutional right to due process of law.

An abuse of discretion is defined as:

> "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

The petition in the court below alleged facts constituting a very gross abuse of discretion, the refusal of the Industrial Commission to apply the Amended Workmen's Compensation Act of Ohio, the arbitrary refusal of respondents to consider material evidence, the arbitrary refusal to classify the occupational disease, and that the finding of the commission was without support in the evidence, was against all of the evidence, and was based solely on conjecture.

The Supreme Court of the United States in St. Joseph Stockyards Company v. United States states in 298 U. S., page 74, that the court may set aside the order of an administrative tribunal for any error of law, for lack of findings necessary to support the order, or because findings were made without evidence to support them; or because the evidence was such that it was impossible for a fair-minded board to come to the result which was

reached, or because facts and circumstances which ought to have been considered were excluded from consideration.

CONCLUSION.

The petitioner having come into court in the only manner open to him, and having stated facts in his petition showing the Industrial Commission committed errors of law, exceeded its jurisdiction, and grossly abused its discretion, it became the judicial duty of the Supreme Court of Ohio to protect the petitioner's constitutional rights and not leave such rights at the mercy of administrative officials.

Respectfully submitted,

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